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II. This is in response to the Office Action dated December 26, 2002, the period for reply having been extended by the above petition and payment of the extension fee. Please amend the application as follows and consider the following remarks:

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Remarks

The claims are 1, 2, 4-11, 13-20, 25 and 29-34, with claims 1, 4, 6, 8, 10, 20 and 31-34 being independent. Reconsideration of the present claims is respectfully requested.

Claims 1, 2, 4-11, 13-20, 25 and 29-34 stand provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-16, 29, 32-37, 72 and 85 of copending Application No. 09/982,180. Applicants respectfully traverse this rejection.

The presently pending claims are not obvious over the noted claims of the '180 application. The stable artificially-sweetened calcium-fortified beverage concentrates and beverages of the '180 application necessarily include artificial sweeteners and edible acids and may include any of a variety of calcium salts. On the other hand, the presently pending claims are completely closed to the possibility of including artificial sweeteners, edible acids and any calcium salts other than a hydrate form of calcium sulfate. What is more, there is no suggestion to modify the claims of the '180 application to include the limitations of the present claims; in fact, if the claims of the '180 application were modified to remove the presence of artificial sweetener and edible acids, the key features of the invention disclosed therein would be lost. Accordingly, Applicants submit that the

presently pending claims are not obvious over the claims of the '180 application and respectfully request withdrawal of the double patenting rejection.

Claims 1, 2, 4-11, 13-20, 25 and 29-34 stand rejected under 35 U.S.C. §103(a) as being obvious over Braun in view of Couzy and Lindon and further in view of Yang and Brafford and the chart provided by Applicants. Applicants respectfully traverse this rejection.

At the outset, Applicants would like to point out that the chart provided to the Examiner during the interview of July 9, 2002, did not appear in any published document and does not present generally known information. Instead, that chart was a summary of some of the detailed research and development that went into the formulation of the present invention; in other words, the chart was Applicants' own work with regard to the present invention. Accordingly, the chart is not prior art and cannot be used as part of a prior art rejection. What is more, the fact that Applicants performed tests to determine taste characteristics of various salts evidences the lack of knowledge in the art regarding the taste characteristics of various salts.

There is no doubt that the present invention is not anticipated by any known prior art. This is evidenced by the lack of a §102 rejection. Therefore, the only remaining question is whether the cited combination of remaining references, i.e., Braun, Couzy, Lindon, Brafford and Yang, renders the invention obvious. Applicants submit that the answer to this query is no. In order to establish a *prima facie* case of obviousness, (1) there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings, (2) there must be a reasonable expectation of success and

(3) the prior art references must teach or suggest all the claim limitations. The cited combination of Braun, Couzy, Lindon, Yang and Brafford fails in all three respects.

First, there is no motivation to combine the reference teachings. Braun relates to calcium-supplemented beverages which contain a preferred calcium salt blend and edible acids; Couzy and Lindon relate to a naturally-occurring and an artificial mineral water, respectively; Brafford relates to cheese and dairy products containing a particular calcium salt blend; and Yang relates to low acid calcium-supplemented beverages using a variety of calcium sources. There is certainly no explicit suggestion to combine these references. Applicants submit that there is further no implicit suggestion to be found. For example, there is just no apparent benefit to the combination of a mineral water with another type of calcium-supplemented beverage. Similarly, it would seem unlikely that a particular calcium salt blend which is effective in cheese would be combined with another calcium salt blend which is useful in beverages.

In an event, even if there were some suggestion to combine the references (which Applicants do not find), any beverage that would be made by combining Braun, Couzy, Lindon, Yang and Brafford would be very different from the presently claimed beverage compositions. In other words, the combination is flawed. A beverage obtained by combining the cited references would necessarily contain edible acids (Braun), other calcium salts (Braun, Brafford and Yang), minerals (Couzy and Lindon), and dairy or cheese components (Brafford). The presently claimed, bland, neutral tasting, calcium fortified beverage compositions consist only of purified water, a hydrate form of calcium sulfate in an amount providing fortification of about 10% RDV and optionally one or more non-mineral nutritional supplements, a flavor component and/or a preservative system.

Second, the cited combination of references provides no reasonable expectation of success in achieving an acceptable calcium-fortified beverage as presently claimed. Truly, the two newly cited references Brafford and Yang teach away from the present invention entirely. Brafford sets forth in its abstract:

By using a mixture of calcium sulfate and tricalcium phosphate the bitterness normally associated with calcium sulfate and the graininess normally associated with tricalcium phosphate are surprisingly essentially eliminated.

Given this disclosure, no one of ordinary skill in this art would expect a beverage fortified with calcium sulfate alone to provide an acceptable taste, as they would expect it to have a characteristic bitterness.

In addition, Yang sets forth in pertinent part:

Although some inorganic salts of calcium, such as calcium salts of bicarbonate, chloride, sulfate and some phosphates, possess a solubility which allows relatively high levels of calcium to be added to water, they produce unacceptable off tastes. Paragraph [0007].

Given this disclosure, no one of ordinary skill in this art would expect a beverage fortified with calcium sulfate to produce an acceptable taste, as they would expect it to have an unacceptable off-taste. Further, while Yang later identifies calcium sulfate as an acidic calcium salt (paragraph [0163]) which can be used therein as a calcium source, Yang sets forth that a lone acidic calcium salt can only be used when fortifying to a level of from 1 to 171 ppm elemental calcium concentration (paragraphs [0050] and [0068]). When fortifying to a level comparable to that achieved in the present invention, i.e., from 341 to 850 ppm in paragraphs [0105] and [0134], Yang sets forth that an acidic calcium salt must

be used in combination with an organic calcium salt, a mixed organic acid salt, a basic calcium salt, an organic acid or a combination of these (paragraphs [0105] to [0123] and [0134] to [0152])). Given this disclosure, one of ordinary skill in this art would expect to achieve unacceptable results when fortifying with calcium sulfate alone at a level of at least 10% RDV.

Further, Couzy and Lindon, directed to mineral waters, provide no expectation of success in achieving a calcium-supplemented non-mineral water beverage. Braun likewise fails to provide a reasonable expectation of success in achieving an acceptable beverage by fortification with calcium sulfate alone; Braun appears to premise its success upon the combination of calcium salts and edible acids to facilitate solubility and enhance flavor.

Finally, the cited combination of references fails to teach or suggest all of the claim limitations. Most importantly, there is no identification in the cited references of a hydrate form of calcium sulfate as the sole source of calcium to provide a level of fortification of at least 10% RDV as is presently claimed. In addition, there is no identification in the cited references of a beverage consisting only of purified water, such a calcium source, and optionally a non-mineral nutritional supplement, flavor and/or preservative, as is presently claimed. In fact, due to the numerous other ingredients necessarily present in all of the cited references, the references serve to teach away from the simply-constituted beverage compositions of the present invention.

In sum, the Examiner fails to establish a *prima facie* case of obviousness using Braun, Couzy, Lindon, Yang and Brafford. There is no motivation to combine the references, and, if combined, the combination of references fails to suggest the presently claimed beverage compositions. There is no reasonable expectation of success in

achieving an acceptable beverage fortified to a level of at least 10% RDV using a hydrate form of calcium sulfate alone. The cited combination of references fails to teach or suggest the claim limitations. Contrary to the Examiner's position, the present invention is not merely a recipe which has omitted certain ingredients. What the Examiner fails to realize is that it is truly surprising that a bland, neutral-tasting beverage having a calcium fortification of at least 10% RDV can be obtained by using a hydrate form of calcium sulfate as the sole source of calcium when no other ingredients are present to promote solubility or enhance taste.

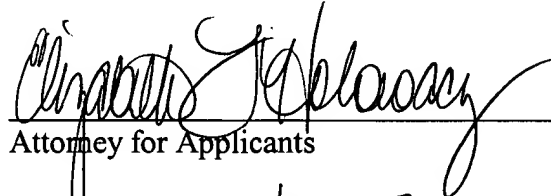
Furthermore, the present invention is also directed to a method of making beverage compositions as discussed above. None of the cited references disclose or suggest any of the steps of the presently claimed method. What is more, no *prima facie* case of obviousness is established with regard to claim 10 of the present invention for many of the reasons discussed above.

In sum, it is clear that none of Braun, Couzy, Lindon, Yang, Brafford and Applicants' chart, whether considered alone or in any combination, render obvious the present invention. There is simply no disclosure or suggestion of the use of a hydrate form of calcium sulfate alone as a source of calcium to produce a calcium fortified beverage composition (at least 10% US RDV), the only other ingredient of which is purified water and optionally a non-mineral nutritional supplement, flavor and/or preservative. Accordingly, Applicants respectfully request withdrawal of this rejection.

In view of the foregoing remarks, favorable reconsideration and passage to issue of the present case is respectfully requested. If, upon consideration of this paper, the Examiner believes there are any outstanding issues, it is respectfully requested that the Examiner contact the undersigned attorney in an effort to expeditiously resolve such issues.

Applicants' undersigned attorney may be reached in our New York office by telephone at (212) 218-2100. All correspondence should continue to be directed to our address given below.

Respectfully submitted,

  
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